No. 87-6116

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STEVEN ANTHONY PENSON,
Petitioner,

v.

STATE OF OHIO,
Respondent.

On Writ Of Certiorari To The Court Of Appeals Of Montgomery County, Ohio

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. BECAUSE THE OHIO COURT OF APPEALS DETERMINED THAT PENSON'S APPEAL WAS NONFRIVOLOUS, IT WAS REQUIRED TO APPOINT COUNSEL TO PURSUE HIS APPEAL AND DIRECT COUNSEL TO PREPARE AN ADVOCATE'S BRIEF BEFORE DECIDING THE MERITS OF THE APPEAL.

Noticeably absent from Respondent State of Ohio's (hereafter State) brief is any citation to or discussion of the precedents of this Court mandating the right to counsel on direct appeal. *See Douglas* v. *California*, 372 U.S. 353 (1963); *Swenson* v. *Bosler*, 386 U.S. 258 (1967); *see also* discussion of these cases in Brief For Petitioner (hereafter Br. for Pet.) 11-12. The State also fails to mention or discuss the specific facts of *Anders* v. *California*, 386 U.S. 738 (1967), where counsel similarly withdrew from Anders' appeal after concluding it had no merit, without filing a brief with the court. *See* discussion of *Anders'* facts in Br. for Pet. 13.

The State does acknowledge that the *Anders* procedures were designed to protect the constitutional requirements of substantial equality and fair process for indigent defendants on direct appeal. The State then disparages *Anders* by asserting that "in actual practice *Anders* has created a dual standard of representation of criminal defendants on appeal." Brief for Respondent (hereafter Br. for Resp.) 16. Rather than moving to withdraw per the *Anders* procedures in a frivolous appeal, the State contends, appointed counsel instead often files a "brief raising one or two frivolous issues for the appellate court to digest." *Id.* Thus, the State suggests that *Anders* causes appointed counsel to make frivolous arguments and provides the indigent defendant with more than he is entitled.

The State offers no evidence or authority to support this assertion. Indeed, the Ohio experience appears to be to the contrary. See cases cited in Br. for Pet. 42, fn. 11, and the *Amicus Curiae* brief of the Ohio Association of Criminal Defense Lawyers 4-17, where counsel moved to withdraw without raising any issues. Actually, it is retained counsel that

seldom files a "no merit" brief. *McCoy* v. *Court of Appeals of Wisconsin*, ___ U.S. ___, 100, L.Ed. 2d 440, 453 (1988).

In any event, the State's assertion misses the point of what occurred here. The Ohio Court of Appeals expressly found that Penson's appeal was nonfrivolous and contained arguable, nonfrivolous issues. *See* Joint Appendix (hereafter J.A.) 41. Therefore, under *Anders*, 386 U.S. at 744, the Court was constitutionally obligated to provide Penson with counsel who would file a brief and argue his appeal.

Moreover, any doubts about the wisdom of the *Anders* decision or procedures were resolved by this Court's recent decision in *McCoy* v. *Court of Appeals of Wisconsin*, 100 L.Ed. 2d at 440. Reaffirming *Anders*, *McCoy* held that when appellate counsel represents the appeal is frivolous and seeks to withdraw, the court must make two determinations to satisfy federal constitutional concerns:

> "First, it must satisfy itself that the attorney has provided the client with a diligent and thorough search of the record for any arguable claim that might support the client's appeal. Second, it must determine whether counsel has correctly concluded that the appeal is frivolous."

Id. at 455. These critical determinations cannot be made on the mere statement by counsel that the appeal is frivolous. *Id.* at 454. Thus, *McCoy* reaffirmed *Anders'* requirement that counsel's motion to withdraw be accompanied by "a brief referring to anything in the record that might arguably support the appeal." *Id.* at 454. This will "provide the court with sufficient guidance to make sure that counsel's appraisal of the case is correct," *id.* at 453-54 n.11, and assure that the defendant's constitutional rights are "scrupulously honored." *Id.* at 456. In the instant case, counsel neither concluded the appeal was frivolous nor submitted anything to demonstrate that he had diligently searched the record for arguable errors. *See* J.A. 35. As a result, Penson's constitutional rights to due process, equal protection and effective assistance of counsel were not "scrupulously honored" by the Ohio Court of Appeals.

More importantly, *McCoy* reaffirmed *Anders'* requirement that counsel be appointed to prepare an advocate's brief where, as here, the court concludes that there are nonfrivolous issues to be raised. *Id.* at 457. Because the Ohio Court of Appeals refused to do so, despite Penson's request for new counsel, Penson was denied the benefit of what wealthy defendants could purchase—an attorney who would brief and argue arguable, nonfrivolous claims that would be decided by that court.[1] Penson was therefore denied his Fourteenth Amendment rights to substantial equality with non-indigent defendants and fair procedure on appeal.

II. APPLICATION OF A *STRICKLAND* V. *WASHINGTON*, 466 U.S. 668 (1984), "DEFICIENT PERFORMANCE" STANDARD REQUIRING A SHOWING OF PREJUDICE IS INAPPROPRIATE WHERE COUNSEL DOES NOT FILE AN ADVOCATE'S BRIEF IN A NONFRIVOLOUS APPEAL. IN THIS SITUATION, COUNSEL PROVIDES NO ASSISTANCE, THE ACCUSED IS DENIED COUNSEL, AND PREJUDICE MUST BE PRESUMED.

The State contends that Penson's claim of ineffective assistance of appellate counsel should be judged under *Strickland* v. *Washington's*, 466 U.S. 668 (1984), "deficient performance" standard. Br. for Resp. 21. While this standard may apply in the normal appeal where counsel files a brief and argues issues, see, e.g., *Smith* v. *Murray*, 477 U.S. 527 (1986), it is inappropriate where, as in this case, counsel does not file an advocate's brief in a nonfrivolous appeal. In this situation, there is effectively a denial of counsel as there is "no performance" by counsel or assistance provided to the defendant. *Strickland*, 466 U.S. at 692, and *United States* v. *Cronic*, 466 U.S. 648, 659

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[1] Ohio Law requires that the Court of Appeals pass upon each error assigned and briefed, and state the reasons for its decision. Rule 12(A), Ohio Rules of Appellate Procedure.

(1984), recognized that if counsel is denied or fails to participate in the adversarial process, prejudice is presumed.

While the State concedes that a presumption of prejudice applies where there is a complete denial of counsel or denial of counsel at a critical stage of trial, the State contends the denial here is not of that magnitude. Essentially, the State contends that Penson was not denied counsel because his appellate counsel provided "some representation." Br. for Resp. 22. The State's argument is frivolous.

This Court in *Strickland*, 466 U.S. at 685, recognized that counsel's presence and participation in the adversarial trial process was critical to the ability of the adversarial process to produce just results. Similarly, counsel's presence and participation as an advocate in the adversarial appellate process is essential to an adequate and effective appeal. *Evitts* v. *Lucey*, 469 U.S. 387 (1985). Conversely, counsel's absence or failure to participate in the adversarial process on appeal undermines the reliability of that process. *Cf. Strickland*, 466 U.S. at 685-86; *Cronic*, 466 U.S. at 658-59. A defendant simply cannot receive an adequate and effective review of his conviction unless counsel participates in that process as an advocate. An advocate *advocates*. An attorney who files no brief and withdraws from a nonfrivolous appeal, as Penson's counsel did, has not advocated anything—except that the appeal is without merit. Such conduct is not even constitutionally sufficient where the appeal is allegedly frivolous. *Anders*, 386 U.S. at 744; *McCoy*, 100 L.Ed. 2d at 454.

Thus, an advocate's brief is essential to a nonfrivolous appeal. *See* discussion of importance of brief in Br. for Pet. 20-21. Not even an "*Anders* brief" can serve as a substitute. *McCoy*, 100 L.Ed. 2d at 456. As this Court recently said in *McCoy*, 100 L.Ed. 2d at 452, "counsel for an appellant cannot serve the client's interest without asserting specific grounds for reversal." Since that did not occur here, Penson was effectively denied counsel on appeal.

The State concedes that Penson was entitled to the effective assistance of counsel on direct appeal. The State further points out that *Evitts*, 469 U.S. at 392, did not decide appropriate standards for judging claims of ineffective assistance of appellate counsel. However, *Evitts*, *id.* at 394, did reiterate that counsel must file a brief, citing *Swenson*, 386 U.S. at 258, and that an appellate court's judgment is unconstitutional without it, citing *Anders*, 386 U.S. at 738. Nevertheless, the State surprisingly asserts that Penson "was not entitled to compel his court appointed appellate counsel to press nonfrivolous points requested by [Penson] when counsel, as a matter of professional judgment, decided not to press those points," citing *Jones* v. *Barnes*, 463 U.S. 747, 751 (1983). Br. for Resp. 22. There is, of course, no evidence of any such communication between Penson and his appellate counsel as in *Jones*.

In essence, the State flatly argues that appointed counsel may totally abandon a nonfrivolous appeal. *Jones*, *id.* at 749, does not so hold. To the contrary, *Jones* held that counsel alone, in the exercise of his professional judgment, may choose which nonfrivolous issues to argue on appeal. The Court found this to be consistent with the vigorous and effective advocacy required by *Anders*. *Id.* at 754. There is no advocacy, much less vigorous and effective advocacy, when appellate counsel refuses to file a brief and withdraws from a nonfrivolous appeal. No reasonable professional judgment can support such a decision. *Laffosse* v. *Walters*, 585 F. Supp. 1209, 1213 (S.D.N.Y. 1984).

Smith v. *Murray*, 477 U.S. at 527, cited by the State, see Br. for Resp. 19, is consistent with *Jones* and supports this conclusion. In *Smith*, appellate counsel had filed a brief and asserted errors on appeal. Smith claimed counsel was ineffective because he failed to assert a particular claim. This Court applied a *Strickland* "deficient performance" standard because counsel had advocated other errors in his brief. *Id.* at 535-36. Thus, the "deficient performance" standard may be applicable in the normal appeal where counsel files a brief and argues

issues; however, it is totally inappropriate where, as here, counsel does not file an advocate's brief in a nonfrivolous appeal, but instead withdraws. *Cf. Cannon* v. *Berry*, 727 F. 2d 1020 (11th Cir. 1984); *Freels* v. *Hills*, 843 F. 2d 958 (6th Cir. 1988); *Jenkins* v. *Coombe*, 821 F. 2d 158 (2nd Cir. 1987), *cert. denied*, ____ U.S. ____, 98 L.Ed 2d 655 (1988), discussed in Br. for Pet. 23-25, 30. The "deficient performance" test makes sense only when counsel participates in the adversary process and engages in a performance, i.e., files a brief.

Appellate counsel's conduct in this case can hardly be considered the effective assistance or advocacy required by the Sixth and Fourteenth Amendments. After facilitating transmission of the trial court record to the Ohio Court of Appeals, the record indicates that counsel took only one further action. Counsel filed a "Certification of Meritless Appeal" and Motion to Withdraw certifying that there were no errors requiring reversal of Penson's convictions or sentences. (J.A. 35). The Sixth Circuit addressed an identical situation in *Freels* v. *Hills*, 843 F. 2d 958 (6th Cir. 1988). Chief Judge Engel's analysis is relevant:

> As close as counsel's brief comes to advocacy is the unsupported representation that "upon careful review of the docket and transcript, [he] concludes that the trial court committed no error prejudicial to the defendant." In short, we are wholly unable to find that court-appointed counsel for Freels did more than or indeed even as much as was done by court-appointed counsel in *Anders*. In *Anders*, it at least appea[r]s that appointed counsel represented to the appellate court that he had visited and explained his views and opinions to Mr. Anders and subsequently notified the court of appeals that Anders wished to file a brief on his own behalf. *Anders*, 386 U.S. at 739, 87 S.Ct. at 1397. Even this amount of effort was found insufficient to fulfill the constitutional mandate in *Anders*, for the Court there emphasized that counsel's bare no-merit conclusion was not an adequate substitute for the petitioner's right to full appellate review.

Id. at 962. Additionally, in the instant case there is no evidence in the record that appellate counsel even communicated or

consulted with Penson concerning the appeal. Appellate counsel does have a duty to consult with his client concerning the appeal. *See* STANDARDS RELATING TO CRIMINAL APPEALS, Standard 21-3.2 (1986); *McCoy*, 100 L.Ed. 2d at 453 (". . . [I]n advising the client as to prospects for success, counsel must consistently serve the client's interest to the best of his or her ability"). Thus, Penson received less assistance from his appellate counsel than did Anders.

The State argues that *Strickland's* presumption of prejudice analysis does not apply because there was no state interference with counsel's assistance, or conflict of interest by counsel. *See, e.g., Brooks* v. *Tennessee*, 406 U.S. 605 (1972); *Holloway* v. *Arkansas*, 435 U.S. 475 (1978). The State again fails to recognize that there was a denial of counsel here by the State. Moreover, it was the *state* Court of Appeals, that had an affirmative duty to provide counsel, that denied him counsel. The constitutional violation is more egregious here than in a conflict situation or the usual state interference case. *Cf. Holloway*, 435 U.S. at 476-81; *Brooks*, 406 U.S. at 606. In those cases, some assistance is provided the defendant, albeit impaired in a constitutional sense. Here, Penson received *no assistance*. The constitutional result in either situation is the same: counsel's assistance is presumptively ineffective and reversal is required.

The State further argues that the *Strickland* "deficient performance" standard would be readily workable on appeal "because the reviewing court would have the benefit of a fully developed trial record before it which would enable it to evaluate a claim of ineffective assistance of appellate counsel just as the Court was able to do in *Strickland*." Br. for Resp. 21-22. The State confuses the processes by which claims of ineffective assistance of trial counsel and ineffective assistance of appellate counsel must be judged. Counsel's performance at trial can normally be judged because there is a "fully developed record" of his performance. For example, in *Strickland*, 466 U.S. at 672-74, 699-700, there were sufficient facts as to trial counsel's

performance to make a judgment regarding his effectiveness. On the other hand, where counsel files no brief on appeal, there is "no record" of any performance to evaluate. Where trial counsel refuses to participate at trial, prejudice is presumed. *Martin* v. *Rose*, 744 F. 2d 1245 (6th Cir. 1984). The result should be no different on appeal. It is unrealistic to suggest that a performance or deficiency yardstick be used to judge or measure that which does not exist.

What the State suggests is incredibly frightening. It suggests that if there was sufficient evidence to support the guilty verdict, then counsel's withdrawal from a nonfrivolous appeal, and the appellate court's affirmance of the conviction, is not prejudicial. Br. for Resp. 21-23. In other words, if the trial record shows sufficient evidence of guilt, an accused can be denied counsel on appeal unless he can show he would have won on appeal had he had counsel. This Court's decisions in *Douglas*, 372 U.S. at 358, *Swenson*, 386 U.S. at 259, *Anders*, 386 U.S. at 744, *Entsminger* v. *Iowa*, 386 U.S. 748 (1967), and *McCoy*, 100 L.Ed. 2d at 440, demonstrate that counsel's assistance on appeal is essential to adequate and effective review. Unless we are prepared to dismantle our state systems of appellate review, and reconsider or wholly abandon the reasoning of these decisions, a minimum performance by counsel must be guaranteed. The right to effective assistance of counsel on appeal further protects the fairness of the criminal justice system by insuring that all defendants are guaranteed a fair trial.

Vindication of Penson's right to effective assistance of counsel on appeal is not a windfall as the State suggests. *See* Br. for Resp. 22. As this Court said in *Kimmelman* v. *Morrison*, 477 U.S. 365, 380 (1986):

> . . . *we have never intimated that the right to counsel is conditioned upon actual innocence*. The constitutional rights of criminal defendants are granted to the innocent and the guilty alike. Consequently, we decline to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent or that it attaches only to matters affecting the determination of actual guilt. (Footnote omitted) (Emphasis added).

The State further contends that Penson has failed to demonstrate prejudice from the Ohio Court of Appeals' handling of his case, i.e., specific errors in the trial record that would have been successful had they been raised on appeal. Br. for Resp. 23. Those errors are not properly before this Court because they were not raised by Penson's appellate counsel. Thus, it would not be appropriate for this court to pass on them or engage in a harmless error analysis when they have not been argued in or passed upon by the lower courts. *Rose* v. *Clark*, 478 U.S. ____, 92 L.Ed. 2d 460, 474. Nonetheless, there were issues that appellate counsel could have raised on Penson's behalf, in addition to those raised by his co-defendants, Richard Brooks and John Smith.

Since the State has made this argument, the following are some additional issues Penson's appellate counsel could have raised. The trial court erred in convicting and sentencing Penson for both the offense of having a weapon under disability, Ohio Revised Code Annotated (Page) (hereafter O.R.C.) § 2923.13(A)(2), and a firearm specification, O.R.C. § 2929.71. *See* J.A. 33-34. The firearm specification, O.R.C. § 2929.71, is arguably a felony offense under Ohio law, see O.R.C. §§ 2901.03(A), 2901.02(E), since it provides a prohibition and a penalty of three years imprisonment, must be alleged in the indictment, O.R.C. § 2941.141, and must be proven beyond a reasonable doubt. *State* v. *Boyce* (1985), 21 Ohio App. 3d 153, 486 N.E. 2d 1246; *Cf. McMillan* v. *Pennsylvania*, 477 U.S. 79, 87-88 (1986); *United States* v. *Brewer*, 841 F. 2d 667 (6th Cir. 1988). Ohio's multiple counts statute, O.R.C. § 2941.25, prohibits conviction for more than one offense where the same conduct constitutes two or more offenses but there is no separate animus for commission of each offense. *State* v. *Bickerstaff* (1984), 10 Ohio St. 3d 62, 65-66, 461 N.E. 2d 892. In light of O.R.C. § 2941.25, Penson's convictions for both offenses would also violate the double jeopardy provisions of the state and federal constitutions. *Missouri* v. *Hunter*, 459 U.S. 359 (1983).

The trial court also erred in failing to dismiss, see Trial Transcript (hereafter Tr.) 547-552, the charge of having a weapon under disability, O.R.C. § 2923.13(A)(2), because the state failed to present any evidence to establish beyond a reasonable doubt that Penson possessed a firearm as defined in O.R.C. § 2923.11 ("any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant"). Proof of mere possession of a gun, *Boyce*, 21 Ohio App. 3d at 153, 486 N.E. 2d 1246, or making threats with a gun is insufficient. *State* v. *Gaines* (Jan. 19, 1988), Scioto App. No. 1629, unreported; *State* v. *Foster* (April 11, 1985), Cuyahoga App. No. 48885, unreported.[2]

The trial court further improperly instructed the jury in at least two respects. First, in charging the jury on the firearm specifications, O.R.C. § 2929.71, see Tr. 685, the trial court failed to instruct the jury that it was required to find the existence of the specifications beyond a reasonable doubt as required by Ohio law, and the Due Process Clause of the Fourteenth Amendment. *Boyce*, 21 Ohio App. 3d at 153, 486 N.E. 2d at 1247; *In re Winship*, 397 U.S. 358 (1970). A reasonable juror therefore could have reasonably interpreted the instruction to mean that such proof was not required. *Sandstrom* v. *Montana*, 442 U.S. 510, 516-17; *Francis* v. *Franklin*, 471 U.S. 307, 315 (1985).

The trial court committed the same constitutional error when it instructed the jury on the offense of having a weapon while under disability, O.R.C. § 2923.13(A)(2). It failed to instruct the jury that they had to find the elements of this offense beyond a reasonable doubt. (Tr. 684-85).

Additionally, at least three of the issues raised in co-defendant Richard Brooks' appeal were very viable issues for further

[2] The *Gaines* and *Foster* decisions have been lodged with the Clerk.

appeal to the Ohio Supreme Court.[3] The Ohio Court of Appeals action denied Penson the opportunity to further appeal these and the other issues discussed above to the Ohio Supreme Court and to further pursue relief in federal court. *See Ross* v. *Moffitt*, 417 U.S. 600, 611-12 (1974).

Finally, some of these issues, e.g., those dealing with voir dire and sentencing, demonstrate that errors raised on appeal often go beyond the determination of guilt or innocence. Thus, a determination that there is sufficient evidence in the record to support the convictions does not adequately protect a defendant's right to appeal as the State contends.

[3] Brooks raised a *Batson* v. *Kentucky*, 476 U.S. 79 (1986), issue because the prosecutor had used two peremptory challenges to remove the only two blacks on the jury. Tr. 149-151. *State* v. *Brooks* (June 4, 1987), Montgomery App. No. 9190, unreported. [The *Brooks* decision has been lodged with the Clerk]. The Court of Appeals held that defense counsel's objection was not timely because the jury had been sworn, although the alternates had not been selected. *Id.* at 10-11. Assuming, *arguendo*, the Court of Appeals' ruling to be correct, Penson still had the right to claim his trial counsel was ineffective for failing to timely object and appeal any adverse ruling to the Ohio Supreme Court. Brooks also raised the State's failure to prove beyond a reasonable doubt that he possessed a firearm, as defined in O.R.C. § 2923.11(B), which is required to prove the firearm specifications, O.R.C. § 2929.71. While the court overruled Brooks' argument, the issue as to the kind of proof necessary to prove the firearm element of the firearm specification statute is soon to be addressed by the Ohio Supreme Court. *See State* v. *Gaines* (Jan. 19, 1988), Scioto App. No. 1629, unreported, *certified to Ohio Supreme Court*, Case No. 88-323. [The *Gaines* decision and certification order have been lodged with the Clerk.] Finally, *Brooks* raised the trial court's improper instruction to the jury on complicity. The court's instruction implied that one of the defendants had committed each of the offenses, see TR. 676-77, and was not the standard Ohio jury instruction on complicity. See 4 Ohio Jury Instructions (1987) 340-41, § 523.03. The Court of Appeals overruled this argument, but one judge dissented. *Brooks* at 12-13, 18.

III. A HARMLESS ERROR ANALYSIS IS INAPPROPRIATE WHERE COUNSEL NEITHER FILES NOR THE COURT REQUIRES AN ADVOCATE'S BRIEF IN A NONFRIVOLOUS APPEAL AS IT IS EQUIVALENT TO A DENIAL OF COUNSEL.

The State argues that any constitutional error involving a violation of Penson's right to counsel on appeal is harmless error. Br. for Resp. 24-27. Contrary to the State's argument, the decisions of this Court make a harmless error analysis inappropriate here. Traditionally, the harmless error rule is only applied where the error does not affect an accused's substantial rights, *Chapman* v. *California*, 386 U.S. 18, 23 (1967), or the underlying fairness of a trial. *Rose* v. *Clark*, 478 U.S. ___, 92 L.Ed. 2d 460, 470; *Delaware* v. *Van Arsdall*, 473 U.S. 673, 681 (1986); *Satterwhite* v. *Texas*, ___ U.S. ___, 100 L. Ed. 2d 284 (1988). *See, e.g., Moore* v. *Illinois*, 434 U.S. 220, 232 (1977) (admission of witness' identification obtained in violation of right to counsel); *Milton* v. *Wainwright*, 407 U.S. 371 (1972) (admission of confession obtained in violation of right to counsel).

On the other hand, this Court has repeatedly recognized that Sixth Amendment violations of the right to counsel that "pervade the entire proceeding" "cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless." *Satterwhite*, 100 L.Ed. 2d at 293. *See also Holloway*, 435 U.S. at 475 (conflict of interest at trial); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (denial of counsel); *White* v. *Maryland*, 373 U.S. 59 (1963) (absence of counsel at arraignment affected entire trial because defenses not asserted were irretrievably lost). Thus, a trial where counsel is denied cannot reliably serve as a vehicle for determination of guilt or innocence and is fundamentally unfair. *Rose*, 92 L.Ed. 2d at 470.

An appeal is an "integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant." *Griffin* v. *Illinois*, 351 U.S. 12, 18 (1956). Counsel's presence and participation in the appellate process is fundamental and essential to adequate and effective review. *Douglas*, 372 U.S. at 356; *Evitts*, 469 U.S. at 392. Even where counsel alleges the appeal to be frivolous, an "*Anders* brief" must be filed to assure that the accused's constitutional rights are "scrupulously honored." *McCoy*, 100 L.Ed. 2d at 456. Accordingly, where, as in this case, appellate counsel is effectively denied in a nonfrivolous appeal, the appeal cannot reliably serve as a vehicle for finally adjudicating the guilt or innocence or appropriate sentence of a defendant and is fundamentally unfair.

As described in argument II, *supra*, counsel's refusal to assert available nonfrivolous issues in an advocate's brief essentially waived any opportunity for Penson to convince the court of their merits. *Cf. Evitts*, 469 U.S. at 389 (counsel failed to comply with appellate procedural rule, resulting in dismissal of appeal without ruling on merits). Since that opportunity is the sole function of an appeal, counsel's conduct "affected - and contaminated - the entire criminal proceeding." *Satterwhite*, 100 L.Ed. 2d at 294 (1988).

Rose v. *Clark*, 92 L.Ed. 2d at 460, cited by the State, does not support its position. In *Rose*, this Court applied a harmless error test to a *Sandstrom*, 442 U.S. at 510, violation. However, the Court stated that a harmless error analysis presupposes representation by counsel. *Rose*, 92 L.Ed. 2d at 470. The Court further held that unlike errors *such as the denial of counsel*,

> . . . the error in this case did not affect the composition of the record. Evaluation of whether the error prejudiced [the defendant] thus does not require any difficult inquiries concerning matters that might have been, but were not, placed in evidence. Consequently, there is no inherent difficulty in evaluating whether the error prejudiced [the defendant] in this case.

Id. at 471-72 n. 7. The State uses this language to argue that this Court can review the trial record herein and determine the presence or absence of prejudice without any inherent difficulty. Br. for Resp. 27. The State's analysis is again inaccurate.

The error in this case, the denial of appellate counsel, did affect the composition of the appellate record reviewed by the Ohio Court of Appeals. Penson's appellate counsel presented no errors to that court. A harmless error analysis would require inquiry into issues that might have been, but were not, raised on appeal. Application of a harmless error test in this context would therefore be extremely speculative and not worth the costs. *Strickland*, 466 U.S. at 692. Until these issues are briefed, argued, and passed upon by the Ohio Court of Appeals, there is no way of knowing whether any would have been successful. "Thus, any inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation." *Holloway* v. *Arkansas*, 435 U.S. at 490-91 (citations omitted).

Moreover, this Court should not defer to the Ohio Court of Appeals' finding of harmless error as it was that court that violated Penson's right to counsel. *See Rose* v. *Mitchell*, 443 U.S. 545 (1979) (trial court that violated Fourteenth Amendment in operation of grand jury system not likely to give full and fair hearing to such a claim). After applying the wrong legal standard, see *Anders*, 386 U.S. at 743, and failing to "scrupulously honor" Penson's right to counsel, see *McCoy*, 100 L.Ed. 2d at 456, the court summarily concluded that Penson had not been prejudiced by the denial of counsel. (J.A. 41). The Court engaged in no analysis of any issues other than one raised by a co-defendant, Richard Brooks. (J.A. 41).

The inadequacy of the Ohio Court of Appeals' conclusion as to harmless error or lack of prejudice is evidenced by the fact that the court did not discover this plain error until it was raised in Richard Brooks' appeal, after it had already adversely decided the other co-defendant, John Smith's, appeal.[4] Had the error

[4] These decisions, *State* v. *Brooks* (June 4, 1987), Montgomery App. No. 9190, unreported, *State* v. *Smith* (May 13, 1987), Montgomery App. No. 9168, unreported, and *State* v. *Smith* (June 5, 1987), Montgomery App. No. 9168, unreported (Amended Opinion), have been lodged with the Clerk.

not been raised by Brooks, it is highly unlikely Penson would have received the benefit of it. This further demonstrates why a harmless error analysis by the same court that denied the right to counsel cannot guarantee a defendant an adequate and effective review of his conviction. A harmless error standard simply cannot adequately assure protection of a defendant's fundamental right to counsel. *See* discussion in Br. for Pet. 21-22, 33-37, 45, regarding inadequacy of courts deciding issues without benefit of briefing and oral argument and federal habeas court's ability to review unlitigated state law issues.

One of the most fundamental rights in our criminal justice system is the accused's right to be heard by counsel. As Justice Sutherland said over fifty years ago in *Powell* v. *Alabama*, 287 U.S. 45, 68 (1932),

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. . . ."

See also Cronic, 466 U.S. at 653. Steven Penson was denied that basic right in this case. Because his appointed attorney refused to provide any assistance, his appeal was nothing more than a "meaningless ritual". *Douglas*, 372 U.S. at 358. In short, the denial of counsel rendered Penson's appeal fundamentally unfair. *Evitts*, 469 U.S. at 395-396; *Cf. Gideon*, 372 U.S. at 335.

To suggest that a denial of counsel on appeal can be nonprejudicial not only demeans this fundamental constitutional right but the very appellate adversary process to which it is so essential. A concern for actual prejudice here misses the point. What is at stake here is the fairness and integrity of our appellate adversary system of criminal justice. *Cf. Young* v. *U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. ____, 95 L.Ed. 2d 740, 761 (1987), (appointment of interested prosecutor improper). These fundamental values cannot be protected unless the accused has counsel. *See Kimmelman*, 477 U.S. at 374. Therefore, society's interest in fairly and finally adjudicating the guilt or innocence of a defendant cannot be adequately

protected by a harmless error or prejudice standard, as such standard would not be sensitive to the fundamental nature of the error committed. *Young*, 95 L.Ed. 2d at 761.

CONCLUSION

For the foregoing reasons, Petitioner Steven Anthony Penson requests that the judgment of the Montgomery County, Ohio Court of Appeals be reversed and that the court be ordered to provide him with another appeal in which he is afforded the assistance of counsel.

Respectfully submitted,

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APPENDIX

CONSTITUTION OF THE UNITED STATES

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

OHIO REVISED CODE

§ 2901.02 Classification of offenses.

As used in the Revised Code:

(A) Offenses include aggravated murder, murder, aggravated felonies of the first, second, and third degree, felonies of the first, second, third, and fourth degree, misdemeanors of the first, second, third, and fourth degree, minor misdemeanors, and offenses not specifically classified.

(B) Aggravated murder when the indictment or the count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section

2929.04 of the Revised Code, and any other offense for which death may be imposed as a penalty, is a capital offense.

(C) Aggravated murder and murder are felonies.

(D) Regardless of the penalty which may be imposed, any offense specifically classified as a felony is a felony, and any offense specifically classified as a misdemeanor is a misdemeanor.

(E) Any offense not specifically classified is a felony if imprisonment for more than one year may be imposed as a penalty.

(F) Any offense not specifically classified is a misdemeanor if imprisonment for not more than one year may be imposed as a penalty.

(G) Any offense not specifically classified is a minor misdemeanor if the only penalty which may be imposed is a fine not exceeding one hundred dollars.

OHIO REVISED CODE

§ 2901.03 Common law offenses abrogated.

(A) No conduct constitutes a criminal offense against the state unless it is defined as an offense in the Revised Code.

(B) An offense is defined when one or more sections of the Revised Code state a positive prohibition or enjoin a specific duty, and provide a penalty for violation of such prohibition or failure to meet such duty.

(C) This section does not affect any power of the general assembly under section 8 of Article II, Ohio Constitution, nor does it affect the power of a court to punish for contempt or to employ any sanction authorized by law to enforce an order, civil judgment, or decree.

OHIO REVISED CODE

§ 2923.11 Definitions.

As used in sections 2923.11 to 2923.24 of the Revised Code:

(A) "Deadly weapon" means any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon.

(B) "Firearm" means any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant. "Firearm" includes an unloaded firearm, and any firearm which is inoperable but which can readily be rendered operable.

(C) "Handgun" means any firearm designed to be fired while being held in one hand.

(D) "Semi-automatic firearm" means any firearm designed or specially adapted to fire a single cartridge and automatically chamber a succeeding cartridge ready to fire, with a single function of the trigger.

(E) "Automatic firearm" means any firearm designed or specially adapted to fire a succession of cartridges with a single function of the trigger. "Automatic firearm" also means any semi-automatic firearm designed or specially adapted to fire more than thirty-one cartridges without reloading, other than a firearm chambering only .22 caliber short, long, or long-rifle cartridges.

(F) "Sawed-off firearm" means a shotgun with a barrel less than eighteen inches long, or a rifle with a barrel less than sixteen inches long, or a shotgun or rifle less than twenty-six inches long overall.

(G) "Zip-gun" means any of the following:

(1) Any firearm of crude and extemporized manufacture;

(2) Any device, including without limitation a starter's pistol, not designed as a firearm, but which is specially adapted for use as such;

(3) Any industrial tool, signalling device, or safety device, not designed as a firearm, but which as

designed is capable of use as such, when possessed, carried, or used as a firearm.

(H) "Explosive device" means any device designed or specially adapted to cause physical harm to persons or property by means of an explosion, and consisting of an explosive substance or agency and a means to detonate it. "Explosive device" includes without limitation any bomb, any explosive demolition device, any blasting cap or detonator containing an explosive charge, and any pressure vessel which has been knowingly tampered with or arranged so as to explode.

(I) "Incendiary device" means any firebomb, and any device designed or specially adapted to cause physical harm to persons or property by means of fire, and consisting of an incendiary substance or agency and a means to ignite it.

(J) "Dangerous ordnance" means any of he following, except as provided in division (K) of this section:

(1) Any automatic or sawed-off firearm, or zip-gun;

(2) Any explosive device or incendiary device;

(3) Nitroglycerin, nitrocellulose, nitrostarch, PETN, cyclonite, TNT, picric acid, and other high explosives; amatol, tritonal, tetrytol, pentolite, pecretol, cyclotol, and other high explosive compositions; plastic explosives; dynamite, blasting gelatin, gelatin dynamite, sensitized ammonium nitrate, liquid-oxygen blasting explosives, blasting powder, and other blasting agents; and any other explosive substance having sufficient brisance or power to be particularly suitable for use as a military explosive, or for use in mining, quarrying, excavating, or demolitions;

(4) Any firearm, rocket launcher, mortar, artillery piece, grenade, mine, bomb, torpedo, or similar weapon, designed and manufactured for military purposes, and the ammunition therefor;

(5) Any firearm muffler or silencer;

(6) Any combination of parts that is intended by the owner for use in converting any firearm or other device into a dangerous ordnance.

(K) "Dangerous ordnance" does not include any of the following:

(1) Any firearm, including a military weapon and the ammunition therefor, and regardless of its actual age, which employs a percussion cap or other obsolete ignition system, or which is designed and safe for use only with black powder;

(2) Any pistol, rifle, or shotgun, designed or suitable for sporting purposes, including a military weapon as issued or as modified, and the ammunition therefor, unless such firearm is an automatic or sawed-off firearm;

(3) Any cannon or other artillery piece which, regardless of its actual age, is of a type in accepted use prior to 1887, has no mechanical, hydraulic, pneumatic, or other system for absorbing recoil and returning the tube into battery without displacing the carriage, and is designed and safe for use only with black powder;

(4) Black powder, priming quills, and percussion caps possessed and lawfully used to fire a cannon of a type defined in division (K)(3) of this section during displays, celebrations, organized matches or shoots, and target practice, and smokeless and black powder, primers, and percussion caps possessed and lawfully used as a propellant or ignition device in small-arms or small-arms ammunition;

(5) Dangerous ordnance which is inoperable or inert and cannot readily be rendered operable or activated, and which is kept as a trophy, souvenir, curio, or museum piece.

(6) Any device which is expressly excepted from the definition of a destructive device pursuant to the "Gun Control Act of 1968," 82 Stat. 1213, 18 U.S.C. 921 (a)(4), and any amendments or additions thereto or reenactments thereof, and regulations issued thereunder.

OHIO REVISED CODE

§ 2923.13 Having weapons while under disability.

(A) Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:

(1) Such person is a fugitive from justice;

(2) Such person is under indictment for or has been convicted of any felony of violence, or has been adjudged a juvenile delinquent for commission of any such felony;

(3) Such person is under indictment for or has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse, or has been adjudged a juvenile delinquent for commission of any such offense;

(4) Such person is drug dependent or in danger of drug dependence, or is a chronic alcoholic;

(5) Such person is under adjudication of mental incompetence.

(B) Whoever violates this section is guilty of having weapons while under disability, a felony of the fourth degree.

OHIO REVISED CODE

§ 2929.71 [Additional three years of actual incarceration for offenses involving a firearm.]

(A) The court shall impose a term of actual incarceration of three years in addition to imposing a life sentence pursuant to section 2907.02, 2907.12, or 2929.02 of the Revised Code or an indefinite term of imprisonment pursuant to section 2929.11 of the Revised Code, if both of the following apply:

(1) The offender is convicted of, or pleads guilty to, any felony other than a violation of section 2923.12 of the Revised Code;

(2) The offender is also convicted of, or pleads guilty to, a specification charging him with having a firearm on or about his person or under his control while committing the felony. The three-year term of actual incarceration imposed pursuant to this section shall be served consecutively with, and prior to, the life sentence or the indefinite term of imprisonment.

(B) If an offender is convicted of, or pleads guilty to, two or more felonies and two or more specifications charging him with having a firearm on or about his person or under his control while committing the felonies, each of the three-year terms of actual incarceration imposed pursuant to this section shall be served consecutively with, and prior to the life sentences or indefinite terms of imprisonment imposed pursuant to sections 2907.02, 2907.12, 2929.02, or 2929.11 of the Revised Code, unless any of the felonies were committed as part of the same act or transaction. If any of the felonies were committed as part of the same act or transaction, only one three-year term of actual incarceration shall be imposed for those offenses, which three-year term shall be served consecutively with, and prior to, the life sentences or indefinite terms of imprisonment imposed pursuant to section 2907.02, 2907.12, 2929.02, or 2929.11 of the Revised Code.

(C) No person shall be sentenced pursuant to division (A) of this section unless the indictment, count in the indictment, or information charging him with the offense contains a specification as set forth in section 2941.141 [2941.14.1] of the Revised Code.

(1) "Firearm" has the same meaning as in section 2923.11 of the Revised Code;

(2) "Actual incarceration" has the same meaning as in division (C) of section 2929.01 of the Revised Code, except that a term of actual incarceration imposed pursuant to this section shall not be diminished pursuant to section 2967.19 of the Revised Code.

OHIO REVISED CODE

[§ 2941.14.1] § 2941.141 Specification that offender had a firearm while committing the offense.

(A) Imposition of a term of actual incarceration upon an offender under division (A) of section 2929.71 of the Revised Code for having a firearm on or about his person or under his control while committing a felony is precluded unless the indictment, count in the indictment, or information charging the offense specifies that the offender did have a firearm on or about his person or under his control while committing the offense. A specification to an indictment, count in the indictment, or information charging the offender with having a firearm on or about his person or under his control while committing a felony shall be stated at the end of the body of the indictment, count, or information, and shall be in substantially the following form:

SPECIFICATION (or, SPECIFICATION TO THE FIRST COUNT). The Grand Jurors (or insert the person's or the prosecuting attorney's name when appropriate) further find and specify that (set forth that the offender had a firearm on or about his person or under his control while committing the offense).

(B) As used in this section, "firearm" has the same meaning as in section 2923.11 of the Revised Code.

OHIO REVISED CODE

§ 2941.25 Multiple Counts.

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate

animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

OHIO RULES OF APPELLATE PROCEDURE

RULE 12. DETERMINATION AND JUDGMENT ON APPEAL

(A) Determination. In every appeal from a trial court of record to a court of appeals, not dismissed, the court of appeals shall review and affirm, modify, or reverse the judgment or final order of the trial court from which the appeal is taken. The appeal shall be determined on its merits on the assignments of error set forth in the briefs required by Rule 16, on the record on appeal as provided by Rule 9, and unless waived, on the oral arguments of the parties, or their counsel, as provided by Rule 21. Errors not specifically pointed out in the record and separately argued by brief may be disregarded. All errors assigned and briefed shall be passed upon by the court in writing, stating the reasons for the court's decision as to each such error.

(B) Judgment as a Matter of Law. When the court of appeals determines that the trial court committed no error prejudicial to the appellant in any of the particulars assigned and argued in appellant's brief and that appellee is entitled to have the judgment or final order of the trial court affirmed as a matter of law, the court of appeals shall enter judgment accordingly. When the court of appeals determines that the trial court committed error prejudicial to the appellant and that the appellant is entitled to have judgment or final order rendered in his favor as a matter of law, the court of appeals shall reverse the judgment or final order of the trial court and render the judgment or final order that the trial court should have rendered, or remand the cause to the court with instructions to render such judgment or final order. In all other cases where the court of appeals determines that the judgment or final order of the trial court should be modified as a matter of law it shall enter its judgment accordingly.

(C) Judgment in Civil Action or Proceeding When Sole Prejudicial Error Found Is That Judgment of Trial Court Is Against the Manifest Weight of the Evidence. In any civil action or proceeding which was tried to the trial court without the intervention of a jury, and when upon appeal a majority of the judges hearing the appeal find that the judgment or final order rendered by the trial court is against the manifest weight of the evidence and do not find any other prejudicial error of the trial court in any of the particulars assigned and argued in the appellant's brief, and do not find that the appellee is entitled to judgment or final order as a matter of law, the court of appeals shall reverse the judgment or final order of the trial court and either weigh the evidence in the record and render the judgment or final order that the trial court should have rendered on that evidence or remand the case to the trial court for further proceedings; provided further that a judgment shall be reversed only once on the manifest weight of the evidence.

(D) All Other Cases. In all other cases where the court of appeals finds error prejudicial to the appellant, the judgment or final order of the trial court shall be reversed and the cause shall be remanded to the trial court for further proceedings.

[Amended effective July 1, 1973.]